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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. 81-6131

WILBERT LEE EVANS,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

Upon A Petition For Writ Of Certiorari To The Supreme Court Of Virginia

---

BRIEF OF RESPONDENT IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

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PRELIMINARY STATEMENT

The respondent, Commonwealth of Virginia, respectfully prays that a Writ of Certiorari to the judgment of the Supreme Court of Virginia entered in this case on December 4, 1981, not be granted.

OPINION BELOW

The judgment of the Supreme Court of Virginia is a published Opinion reported as Evans v. Commonwealth, ____ Va. _____, 284 S.E.2d 816 (1981). A copy of the Opinion is attached to the Petition for a Writ of Certiorari as Appendix a.

JURISDICTION

Petitioner asserts that the jurisdiction of this Court to issue the writ of certiorari is grounded upon 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Can petitioner's allegation that Virginia Code § 19.2-264.4 "impermissibly reduces the burden of proof" on the prosecution at sentencing be considered for the first time in this Court?

2. Is Virginia Code § 19.2-264.2 unconstitutional as being vague and overbroad?

3. Was admission of evidence that the petitioner was awaiting trial in another state, on charges for which he could receive life sentences, violative of due process, and is any constitutional issue in this regard properly before the Court?

4. Is certiorari review warranted in this case?

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES INVOLVED

The relevant constitutional and statutory provisions are set forth in the Petition at pages 2 through 3 and in Appendix b and c to the Petition, except for the following Rules of this Court and of the Supreme Court of Virginia:

Rule 17.1 of the Rules of the Supreme Court of the United States provides in pertinent part that "[a] review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor...."

Rule 5:21 of the Rules of the Supreme Court of Virginia provides in pertinent part that "[e]rror will not be sustained [on appeal] to any ruling below unless the objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable [the] Court to attain the ends of

justice. Only errors assigned in the petition for appeal will be noticed by [the] Court and no error not so assigned will be admitted as a ground for reversal of a decision below...."

STATEMENT OF THE CASE

The petitioner, Wilbert Lee Evans, was convicted at a jury trial in the Circuit Court of the City of Alexandria, Virginia, of capital murder as defined by Virginia Code § 18.2-31(f), which is the willful, deliberate, and premeditated killing of a law-enforcement officer for the purpose of interfering with the performance of his official duties. In the second stage of the bifurcated trial, the same jury fixed Evans' punishment at death. After considering the probation officer's report, the trial court imposed the death sentence recommended by the jury.

At the trial the Commonwealth presented evidence that Evans, a prisoner, fatally shot Deputy Sheriff William Truesdale on January 27, 1981, while the officer was conducting him to jail in Alexandria. Evans admitted that he caused Truesdale's death with a firearm while the officer was engaged in the performance of his official duties. Evans consistently maintained, however, and so testified in his own defense, that he did not intend to kill Truesdale, and that the fatal shooting occurred accidentally while Evans was attempting to escape from police custody. (See April 16 tr. 500-502). Defense counsel indicated in his opening statement to the jury that the crucial question throughout the guilt trial would be Evans' intent. (April 16 tr. 277,279).

The uncontradicted evidence shows that Evans was in custody in North Carolina, that he volunteered to testify for the

Commonwealth in a habeas corpus proceeding to be held in Alexandria, and that he was transported from North Carolina to Alexandria for that purpose. Noel I. Butler, Assistant Commonwealth's Attorney, who interviewed Evans in the Alexandria jail on January 26, 1981, found him cooperative, willing to testify, and able to provide testimony of value on behalf of the Commonwealth. On the following day, however, when Evans was brought into the courtroom to testify, he refused to do so, denied any knowledge of the case, and by his behavior caused the court to recess the proceeding. (April 16 tr. 289-291).

Deputy Truesdale removed Evans and two other prisoners, Yvette Boone and Anthony Jasper, from the courthouse to jail in a van. Upon arriving outside the jail, the prisoners proceeded in single file up the steps leading to the jail door, Boone in front, followed by Jasper and then Evans. Jasper's right hand was handcuffed to Evans' left. As Jasper entered the door, Evans began to grapple with Truesdale on the steps. Evans, gaining possession of Truesdale's revolver, shot the officer in the chest from a distance of not more than one-half inch, pointed the weapon at Jasper but did not fire, freed himself by shooting open the handcuffs, and fled on foot. Running through a nearby law office, Evans threatened a secretary with the revolver before continuing his flight. Surrounded by pursuing officers in a nearby parking lot, Evans shot himself, inflicting a superficial wound, and was retaken into custody. (April 16 tr. 341-342, 360-367, 383, 401-407, 413-416, 424-426, 430-437).

Several inmates of the Alexandria jail were called as witnesses for the Commonwealth to testify to certain inculpatory statements made by Evans. Before these witnesses testified,

Evans objected to any reference they might make to charges pending against him in North Carolina on which he had not been convicted. (April 16 tr. 297-299). The court overruled the objection on the ground that such evidence would be admissible to show Evans' intent or state of mind. (April 16 tr. 299-300).

Ralph Washington, an inmate, testified that Evans told him the night before the shooting that he was in Alexandria to testify in a case but that he was not going to say anything, that what he wanted was to "get the hell out." Evans asked Washington about jail security, what court was like, whether the guards carried guns, and whether he could wear civilian clothes to court. He asked another inmate about a good place to run if he escaped. Washington testified that Evans stayed up all night and "was like he was getting ready to go to war." Washington's testimony continued as follows:

> "A. He said he'd already come down; he was already facing life and he ain't got nothing to lose. He said he was going to try any means possible to escape.
>
> "Q. To what steps would he go?
>
> "A. Anybody that gets in his way to stop him, he would take him out.
>
> "Q. Take him out? What does that mean?
>
> "A. I guess kill them."
> (April 16 tr. 301-306).

At this time the court cautioned the jury as follows:

> "Members of the jury, the statements of the defendant are being admitted into evidence not to show his legal situation in the State of North Carolina, but rather to show his state of mind or intention at the time he made the statements. You should consider those statements only in that respect."
> (April 16 tr. 306).

Yvette Boone testified that she was brought from jail in North Carolina to the Alexandria jail to testify as a witness

in the same case in which Evans was expected to testify. While they were still in jail in North Carolina, Evans attempted to coach her in preparation for her appearance in court. He also informed Boone that when he went to court he was going "to run." In Alexandria, before Boone testified at the hearing, Evans told her that he had come not to testify but to escape. She, Jasper, and Evans were the prisoners being taken back to jail when Deputy Truesdale was shot. She saw Truesdale and Evans "tussling on the steps," but she was inside the jail door when she heard the shots fired. (April 16 tr. 335-349).

Anthony Jasper testified that he occupied the same cell with Evans the night before the shooting, and Evans said that he had come to Alexandria "to try to escape." He asked Jasper the way to run to get to Washington, D.C. "He said he ain't got nothing to lose, you know.... He had two life sentences, something like that." (April 16 tr. 355-356). The trial court promptly cautioned the jury that these statements were admitted only to show Evans' state of mind when he made the statements and not to prove whether he was facing punishment in North Carolina. (April 16 tr. 356).

Jasper also testified that he and Evans were handcuffed together on the trip back to jail from the courthouse. Evans asked him whether Truesdale carried a weapon. Jasper had climbed the steps and was entering the jail door when Evans "yanked" him back. He saw Evans and Truesdale struggling over the handgun in Evans' hand. Evans had the gun in the air when Truesdale put his hand on it. Evans said, "Let me go or I'll kill your ass." Then the revolver "came down toward his side and he pulled the trigger." Evans then put the gun to Jasper's head, Jasper protested, and Evans shot the handcuffs off and fled. (April 16 tr. 358, 360-363).

Evans, testifying in his own defense, insisted that he had no intent to escape until he saw that Deputy Truesdale was off balance on the jail steps and decided to "run past him." He seized Truesdale's gun to "shoot the handcuffs off." He denied any intention of shooting the officer but asserted that he shot him accidentally while firing at the handcuffs. (April 16 tr. 487, 498-502).

On appeal to the Virginia Supreme Court Evans conceded that evidence was admissible to show that he planned in North Carolina to escape in Virginia and that, if necessary, he would kill anyone who stood in his way. (See App. a at 6). He argued, however, that the trial court erred in admitting evidence that he was awaiting trial in North Carolina on charges for which he faced one or more life sentences. He relied upon the general rule recently restated in Moore v. Commonwealth, 222 Va. 72, 76, 278 S.E.2d 822, 824 (1981), that evidence of other offenses is inadmissible to prove guilt of the crime for which the accused is on trial. The Virginia Supreme Court pointed out, however, that this general rule, as that Court has frequently stated, is subject to numerous exceptions, and that evidence of other offenses is admissible to show motive or intent or to negate the possibility of accident. (See Appendix a at 6).

At the sentence proceeding which immediately followed the determination of guilt, the Commonwealth presented the testimony of one witness, Officer Louis Pough, of the Alexandria Police Department. Pough testified that he had a conversation with Evans after the Truesdale shooting, and Evans was "concerned about returning to North Carolina on other charges." Evans told Pough that "it mattered not to him who was in his way,"

that he was from the District of Columbia and he "would try to escape again or be killed at home." (April 17 tr. 586). Counsel for Evans objected to Pough's testimony about North Carolina charges and moved for a mistrial. The court overruled the motion but cautioned the jury to disregard the reference to "other charges" pending in North Carolina. (April 17 tr. 586-587).

The other evidence presented at this proceeding consisted of Commonwealth Exhibits 19,20, and 21, showing several of Evans' convictions in North Carolina and the sentences imposed thereon as follows:

February 21, 1964	- Breaking, entering and larceny	- 6 months
July 30, 1964	- Assaulting a police officer with a knife while the officer was in the performance of his duties	- 6 months on road
July 30, 1964	- Engaging in an affray with a knife	- 6 months on road to run consecutively with other sentence of same date
September 30, 1964	- Engaging in an affray with a deadly weapon	- 4 months
December 15, 1970	- Assault & Battery & Assault Inflicting Serious Damage (hitting man in face with his fist, breaking his nose and knocking one tooth out)	- 60 days
July 12, 1972	- Escape from North Carolina Prison System	- 3 months

September 27, 1972	- Assault with a deadly weapon inflicting serious injuries	- not less than four years nor more than five years

Included in the jury instructions, all of which were unchallenged on appeal (See Appendix a at 9), was Instruction No. 14 stating in the alternative what the Commonwealth had to prove before the jury could fix Evans' punishment at death. After retiring to consider its verdict, the jury propounded two questions to the court; first, whether Evans' "past criminal record," to which Instruction No. 14 referred, included all the evidence "offered before and after the verdict," and second, whether Officer Pough's testimony could be considered as part of Evans' record. The court answered both questions in the negative and further instructed the jury that the only evidence of Evans' past criminal record which it could consider was contained in Exhibits 19,20, and 21. (April 17 tr. 610-611). Subsequently, the jury returned its verdict finding "after consideration of his prior history that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society," and fixing Evans' punishment at death.

Evans contended on appeal below that the trial court erred in overruling his motion for a mistrial made when Officer Pough referred to other charges pending against Evans in North Carolina. In rejecting this argument, the Virginia Supreme Court pointed out that the jury was aware that Evans faced charges in North Carolina because of references thereto properly admitted in the guilt trial to show his motive or intent. The trial court, however, expressly directed the jury to disregard the

reference to North Carolina charges in considering the appropriate punishment to be imposed upon Evans. The court further instructed the jury, in answer to its questions, that Evans' past criminal record was limited to convictions shown in Exhibits 19,20, and 21 and did not include anything revealed by Officer Pough's testimony. Furthermore, the Virginia Court perceived no prejudice to Evans resulting from Pough's testimony, but opined that if there was any prejudice, it was eliminated by the trial court's decisive corrective action. (See Appendix a at 10).

After the jury recommended the death sentence, the trial judge in his review of that sentence considered the report of a probation officer. That report, as the Virginia Supreme Court noted, was damaging rather than helpful to Evans. It showed that he had a criminal record more extensive than that introduced into evidence in Exhibits 19,20, and 21, an unsatisfactory prison record, and an employment history which included acts of violence.

In 1968, a District of Columbia court sentenced Evans to serve a total of 720 days for assault and petit larceny. During his incarceration he received four disciplinary reports, including one for fighting. One former employer in the District of Columbia reported that in 1979 he refused to rehire Evans after Evans had "choked" a waitress during an argument. Several other former employers gave unfavorable reports about his work habits and behavior, but two reported that he was a good worker. His prison records in North Carolina revealed that seven disciplinary reports, one for unauthorized possession of a weapon, were filed against him from February 10, 1973, through September 28, 1975. Other convictions in North Carolina not listed in

Exhibits 19,20, and 21 included one in 1962 for assault with a deadly weapon, with a six months sentence suspended, one in 1965 for assault and battery, disorderly conduct, resisting arrest, and breaking arrest, with a six months sentence, and one in 1967 for assault and battery, with a thirty days sentence.

By order entered June 1, 1981, the trial court sentenced Evans to death in accordance with a jury verdict.

On appeal Evans contended, as he had in a pretrial motion (March 19 tr. 2-3), that Virginia Code § 19.2-264.4C was unconstitutionally vague and overbroad in violation of the Eighth and Fourteenth Amendments. The Virginia Supreme Court observed that Evans "relies entirely, however, upon arguments that, as he concedes, [the Virginia Supreme Court] recently rejected in James Dyral Briley v. Commonwealth, 221 Va. 563, 577-80, 273 S.E.2d 57, 65-67 (1980)." (See Appendix a at 2). The Court reaffirmed its Briley Opinion and further cited Martin v. Commonwealth, 221 Va. 436, 439-40, 271 S.E.2d 123, 125-26 (1980). (Appendix a at 2).

Evans also argued on his appeal below that Virginia Code § 19.2-264.2 is facially unconstitutional, and he adopted the arguments that, as he further conceded, the Virginia Supreme Court had already rejected in Smith v. Commonwealth, 219 Va. 455, 248 S.E.2d 135 (1978), cert. denied, 444 U.S. 967 (1979), and Waye v. Commonwealth, 219 Va. 683, 251 S.E.2d 202 (1978), cert. denied, 442 U.S. 924 (1979). After also citing its previous decision in Stamper v. Commonwealth, 220 Va. 260, 267, 257 S.E.2d 808, 814 (1979), cert. denied, 445 U.S. 972 (1980), the Virginia Supreme Court reaffirmed its views expressed in those cases. (Appendix a at 2-3).

After affirmance of Evans' conviction and sentence by the Supreme Court of Virginia on December 4, 1981, no petition for rehearing was filed in that Court.

ARGUMENTS AGAINST GRANTING CERTIORARI

I.

PETITIONER'S ALLEGATION THAT APPLICATION OF § 19.2-264.4 OF THE VIRGINIA CODE "IMPERMISSIBLY REDUCES THE BURDEN OF PROOF ON THE GOVERNMENT" AT SENTENCING IS NOT PROPERLY BEFORE THIS COURT AND THUS CANNOT BE CONSIDERED.

Evans argues in his petition that § 19.2-264.4 of the Virginia Code impermissibly reduces the burden of proof on the government at sentencing, because it requires only that the Commonwealth prove beyond a reasonable doubt that there is "a probability" the defendant in the future would commit criminal acts of violence that would constitute a continuing serious threat to society. (Petition at 9). This issue is clearly not before this Court, because it was not before the Supreme Court of Virginia below.[1]

It has long been established that the Supreme Court of the United States is vested with no jurisdiction unless the federal question asserted was raised and decided in the state court below. Crowell v. Randell, 10 Peters 368, 392 (1836); Godchaux Co. v. Estopinal, 251 U.S. 179 (1919); Jett Brothers Distilling Co. v. Carrollton, 252 U.S. 1, 4-6 (1920); Phillips v. United States, 312 U.S. 246, 252-253 (1941); Beck v. Washington, 369 U.S. 541, 549-550 (1962); Cardinale v. Louisiana, 394 U.S.437 (1969) While an appeal may lie even though the state court is

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[1] Indeed, not only was the issue not raised on appeal, but it was not asserted at trial or assigned as error. Virginia procedure requires that constitutional challenges to state statutes be made in the trial court. Rice v. Commonwealth, 212 Va. 778, 188 S.E.2d 196 (1972); King v. Commonwealth, 219 Va. 171, 247 S.E.2d 368 (1978). See Smith v. Commonwealth, 219 Va. 455, 460 n. 1, 248 S.E.2d 135, 139 n. 1 (1978). Rule 5:21 of the Rules of the Supreme Court of Virginia requires that issues be raised with reasonable certainty at trial. That Rule also states that "[o]nly errors assigned... [for appeal] will be noticed" on appeal.

not explicit in rejecting a timely challenge to the validity of a state statute on federal grounds, the challenge itself must be explicit. See Largent v. Texas, 318 U.S. 418 (1943).

In a federal system it is important that state courts be given the first opportunity to consider the validity of state statutes in light of constitutional challenge because statutes may be construed in a way that saves their constitutionality, or the issue may be resolved by the state court with an adequate state ground for denial of relief. Cardinale v. Louisiana, supra at 439. The Supreme Court of Virginia was not afforded this opportunity as to petitioner's "burden of proof" claim. The issue simply was not presented to that Court.

In the Virginia Supreme Court below, petitioner Evans challenged § 19.2-264.4C as being unconstitutionally broad and vague in its application to his case. His total assertion in that regard was as follows:

> In the interest of brevity of pleading, the defendant in support of his argument that Title 19.2, Section 264.4(c) Code of Virginia (1950), as amended is in violation of the Eighth and Fourteenth Amendments of the United States Constitution would rely on those arguments set forth in Briley v. Commonwealth, 221 Va. 563 (1980) at pp. 577 through 580 inclusive [273 S.E.2d 57, 65-68], and the cases referred to therein. The defendant is aware that the Court has ruled against the same argument. (Brief of Appellant below at 4).

The Virginia Supreme Court in its Opinion below addressed the issue as follows:

> Evans contends that Code § 19.2-264.4C is unconstitutionally vague and overbroad in violation of his rights under the Eighth and Fourteenth Amendments to the United States Constitution. He relies entirely, however, upon arguments that, as he concedes, we have recently rejected in James Dyral Briley v. Commonwealth, 221 Va. 563, 577-80, 273

> S.E.2d 57, 65-67 (1980). We reaffirm our views expressed in that case. See also Martin v. Commonwealth, 221 Va. 436, 439-40, 271 S.E.2d 123, 125-26 (1980).
> (Appendix a at 2).

In Briley there was no assertion of petitioner's "burden of proof" argument concerning probability of dangerousness, and the Virginia Supreme Court did not consider and decide that issue in the case at bar.

II.

SECTION 19.2-264.2 OF THE VIRGINIA CODE IS NOT UNCONSTITUTIONALLY VAGUE AND OVERBROAD IN ITS APPLICATION TO THE PRESENT CASE AS TO VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS.

In the Virginia Supreme Court petitioner challenged § 19.2-264.2 of the Virginia Code as being "facially unconstitutional." He adopted without elaboration, and relied entirely on, the arguments rejected by the Virginia Court in Smith v. Commonwealth, 219 Va. 455, 248 S.E.2d 135 (1978), cert. denied, 441 U.S. 967 (1979), and Waye v. Commonwealth, 219 Va. 683, 699-700, 251 S.E.2d 202, 211 (1978), cert. denied, 442 U.S. 924 (1979).

The Supreme Court of Virginia addressed his contention in the following manner:

> Evans also argues that Code § 19.2-264.2 is facially unconstitutional. He adopts the arguments that, as he further concedes, we rejected in Smith v. Commonwealth, [supra] and Waye v. Commonwealth, [supra]. See Stamper v. Commonwealth, 220 Va. 260, 267, 257 S.E.2d 808, 814 (1979), cert. denied, 445 U.S. 972 (1980). We reaffirm our views expressed in these cases.

In Smith[2] the appellant contended that the statutory

[2] Waye v. Commonwealth, supra at 699-700; 211, the Virginia Supreme Court essentially reaffirmed what it said in Smith.

definition of the "aggravating circumstance" referred to as the "potential dangerousness" of the defendant was so vague as to vest the sentencing authority with standardless sentencing power. This "aggravating circumstance" provides that the death penalty may not be imposed unless the court or jury shall, after consideration of the past criminal record of convictions of the defendant, find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society. As the Virginia Supreme Court noted in Smith, this aggravating circumstance is identical to that in the Texas statute upheld in Jurek v. Texas, 428 U.S. 262 (1976). Rejecting a vagueness challenge to that language, this Court in Jurek said:

> It is, of course, not easy to predict future behavior. The fact that such a determination is difficult, however, does not mean that it cannot be made. Indeed, prediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system. The decision whether to admit a defendant to bail, for instance, must often turn on a judge's prediction of the defendant's future conduct. And any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose. For those sentenced to prison, these same predictions must be made by parole authorities. The task that a Texas jury must perform in answering the statutory question in issue is thus basically no different from the task performed countless times each day throughout the American system of criminal justice. What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine. (428 U.S. at 274-76).

The Virginia Supreme Court has construed the phrase "criminal acts of violence" to mean serious and intentional acts of unprovoked violence committed against the person and the term "probability" to mean a likelihood substantially greater than a mere possibility that the defendant would commit

similar crimes in the future. Smith v. Commonwealth, supra at 478; 149.

Petitioner attempts to distinguish Jurek. He argues that the Texas statute involved in that case required a finding of (1) whether the conduct of the defendant which caused the death of the victim was committed deliberately and with the reasonable expectation that death would result; (2) whether there is a probability that the defendant would commit criminal acts of violence that would be a continuing threat to society; and (3) if raised by the evidence, whether the conduct of the defendant in killing the victim was unreasonable in response to the provocation, if any. (Petition at 7-8).

The respondent submits that petitioner's attempted distinguishing of Jurek is hollow. Consideration number 3 would be patently inapplicable to a situation like the case at bar. Item number 2 is substantially the same as what the jury found in this case and Virginia law requires. Item number 3 is likewise not significant. Virginia law requires that to be convicted and sentenced for capital murder of a law-enforcement officer - as the petitioner was in this case - the jury must find a "willful, deliberate and premeditated killing" of that officer for the purpose of interfering with the performance of his official duties. Section 18.2-31(f), Code of Virginia (1950), as amended. (See Appendix b).

When examining the vagueness issue in connection with the Texas aggravating circumstances Mr. Justice White concurring in Jurek noted "that the issues posed in the sentencing proceeding have a common-sense core of meaning and that criminal jurors should be capable of understanding them." 428 U.S. at 279.

Vagueness challenges to statutes that do not involve First

Amendment freedoms must be examined in the light of the facts of the case at hand.[3] United States v. Mazurie, 419 U.S. 544 (1974). The facts in this case show that petitioner Evans had "a criminal record extending back to his youth showing a consistent pattern of aggression, bellicosity, and violence." (Appendix a at 14). As the Virginia Court below noted, although only the last conviction presented to the jury, that of September 27, 1972, for assault with a deadly weapon inflicting serious injuries, resulted in a substantial prison sentence, there were other convictions for offenses in which Evans used a deadly weapon. One such offense was assaulting a police officer with a knife while that officer was in the performance of his duties. Another offense was for escape from the North Carolina prison system.

The jury could consider Evans' past criminal record together with the circumstances of the murder of Deputy Sheriff Truesdale in determining whether he would probably commit other crimes of violence. Indeed, there was evidence

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[3] The due process protection against excessive vagueness "does not invalidate every statute which a reviewing court believes could have been drafted with greater precision." Rose v. Locke, 423 U.S. 48, 49 (1975) (Upheld phrase "crimes against nature"). Furthermore, "[m]any statutes will have some inherent vagueness, for '[i]n most English words and phrases there lurk uncertainties.'" Id. at 49-50. In applying the vagueness doctrine to state statutes and city ordinances under the due process requirement of the Fourteenth Amendment, the United States Supreme Court has stated that the doctrine is based on the principle that no person "shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." Colten v. Kentucky, 407 U.S. 104,110 (1972), quoting United States v. Harris, 347 U.S. 612, 617 (1954). "The root of the vagueness doctrine is a rough idea of fairness. It is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited." Colten v. Kentucky, supra at 110. That is, "[a]ll the Due Process Clause requires is that the law give sufficient warning that men may conduct themselves so as to avoid that which is forbidden." Rose v. Locke, supra at 50.

that Evans came to Virginia with the sole purpose of escaping, and that he planned to kill, if necessary, anyone who attempted to prevent his escape. Further, after killing Truesdale, Evans reaffirmed his intention to escape even if it meant that he would kill again or be killed.

Section 19.2-264.2 of the Virginia Code is not unconstitutionally vague and broad in its application to this case.

III.

ADMISSION OF EVIDENCE THAT THE PETITIONER WAS AWAITING TRIAL IN ANOTHER STATE WAS NOT VIOLATIVE OF DUE PROCESS, AND NO CONSTITUTIONAL ISSUE IS PROPERLY BEFORE THE COURT.

In his assignments of error from his trial, Evans set forth the following assignment on the admissibility of the challenged evidence:

> The trial court erred in permitting evidence to be admitted to the jury of alleged crimes or pending charges involving the Appellant under the theory that it tended to show "state of mind" to commit the crime he was then being tried for by the jury.

There was no constitutionally-based objection at trial to the admission of the evidence, and the Virginia Supreme Court decided no constitutional question as to the admission of this evidence. (See Appendix a at 6-7).[4] Under Virginia procedure, constitutionally-based objections must be made at trial and

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[4] Petitioner did not file for rehearing claiming that the Virginia Supreme Court had misunderstood or failed to address his position.

assigned as error for appeal. Rice v. Commonwealth, 212 Va. 778, 188 S.E.2d 196 (1972); King v. Commonwealth, 219 Va. 171, 247 S.E.2d 368 (1978); Waye v. Commonwealth, supra at 690 n. 1; 207 n. 1; Rule 5:21, Rules of the Supreme Court of Virginia. Accordingly, no federal question is presented for review by this Court. See generally Beck v. Washington, 369 U.S. 541, 549-554 (1962).

Even assuming, arguendo, that petitioner's due process claim could be considered, it is without merit. This Court has held that the Fourteenth Amendment leaves the states free to adopt a rule of relevance based on the widely recognized principle that evidence of other crimes may be shown to establish intent, design and system. See Lisenba v. California, 314 U.S. 219, 227-228 (1941). See also Williams v. Wolff, 517 F. Supp. 925, 929 (D. Nev. 1981).

In the instant case Evans conceded in the Virginia Supreme Court below that evidence was admissible to show that he planned in North Carolina to escape in Virginia and, if necessary, to kill anyone who stood in his way. (Appendix a at 6). He contended, however, that the trial judge erred in admitting evidence that he was awaiting trial in North Carolina on charges for which he faced one or more life sentences. (Appendix a at 6.

As to the guilt phase of the trial the Supreme Court of Virginia held that:

> Here, the trial court exercised commendable caution in twice instructing the jury during the guilt trial that the statements made by Evans in reference to charges pending against him in North Carolina were admitted into evidence solely for the purpose of showing his intent or state of mind. We hold that the statements were properly admitted for that purpose. The jury could reasonably infer that a prisoner held on charges for which he might

> be sentenced, upon conviction, to imprisonment for life would have a far more compelling motive for attempting to escape by force and violence than one held on charges for which he could receive only a lesser punishment.
> (Appendix a at 7).

In regard to the sentencing phase, Evans contended below that the trial judge erred in overruling his motion for a mistrial made when Officer Pough at the sentence hearing referred to other charges pending against Evans in North Carolina.

In finding no merit to this contention, the Virginia Court below held:

> The jury was aware that Evans faced charges in North Carolina because of references thereto properly admitted in the guilt trial to show his motive or intent. The trial court, however, expressly directed the jury to disregard the reference to North Carolina charges in considering the appropriate punishment to be imposed upon Evans. The court further instructed the jury, in answer to its questions, that Evans' past criminal record was limited to convictions shown in Exhibit 19,20, and 21 and did not include anything revealed by Officer Pough's testimony.
>
> We perceive no prejudice to Evans resulting from Pough's testimony, but if there was any prejudice, it was eliminated by the trial court's decisive corrective action.
> (Appendix a at 10).

Surely this is a matter of state law under the Lisenba principle and not one of constitutional magnitude.

IV.

THIS CASE DOES NOT MERIT REVIEW BY THIS COURT.

A Writ of Certiorari is not a matter of right, but of judicial discretion, and will be "granted only when there are special and important reasons therefor." Rule 17.1 of the Rules of the Supreme Court of the United States. The only

constitutional issues properly before the Court are ones which were previously submitted to the Court on petitions for certiorari in other capital cases in which such writs were denied. See Smith v. Commonwealth, 219 Va. 455, 248 S.E.2d 135 (1978), cert. denied, 444 U.S. 967 (1979); Waye v. Commonwealth, 219 Va. 683, 251 S.E.2d 202 (1978), cert. denied, 442 U.S. 924 (1979); Stamper v. Commonwealth, 220 Va. 260, 267, 257 S.E.2d 808, 814 (1979), cert. denied, 445 U.S. 972 (1980).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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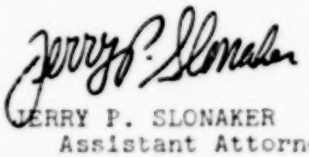

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